JOHN T. FEY, Cler

IN THE

Supreme Court of the United States

October Term, 1956

No. 274

JOSEPH CHITTO, ET AL., MEMBERS, AND AS THE REPRESENTATIVES OF, AND ON THE RELATION OF, THE CHOCTAW INDIANS EAST OF THE MISSISSIPPI RIVER v. THE UNITED STATES

THE UNITED STATES v. JOSEPH CHITTO, ET AL., MEMBERS, AND AS THE REPRESENTATIVES OF, AND ON RELATION OF, THE CHOCTAW INDIANS EAST OF THE MISSISSIPPI RIVER

Appeal of the Choctaw Nation From Order of The Indian Claims Commission Denying Motion for Leave to Intervene

PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF THE COURT OF CLAIMS

(Opinion attached hereto in the Appendix Marked Exhibit A)

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Appeal of the Choctaw Nation From Order of The Indian Claims Commission Denying Motion for Leave to Intervene

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PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF THE COURT OF CLAIMS

(Opinion attached hereto in the Appendix Marked Exhibit A)

The petitioners respectfully show to the Court, as follows:

1. This matter involves the allegations in the second amended petition heretofore filed in the Indian Claims Commission against the United States, (Appendix Exhibit B) growing out of the provisions of Article 14 of the Treaty of September 27, 1830 (7 Stat. 333), (Appen-

dix Exhibit C), known as the Treaty of Dancing Rabbit Creek, between the Choctaw Nation and the United States. That the time of the Treaty petitioners' ancestors were members of the Choctaw Nation, but by not moving to Oklahoma lost their membership in the Choctaw Nation. In said Article 14 the United States agreed to give reservations of land to the ancestors of your petitioners, it being provided therein that if they desired to remain and become citizens of the States they shall be permitted to do so, by signifying their intention to the agent within six months from the ratification of the treaty. Practically all were prevented from securing their reservations by the corrupt and dishonest behavior of the United States agent authorized to receive their notices. (Decision of the Court of Claims, p. 7) Those remaining in Mississippi became entitled to reservations of one section of 640 acres of land, and were entitled to one-half that quantity for each unmarried child which was living with them over 10 years of age; and a quarter section to such child as may be under 10 years of age, "to adjoin the location of the parent." The said Article further provides: "If they reside upon said lands intending to become citizens of the States for five years after the ratification of this Treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this Article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity."

The second amended petition alleges that petitioners bring this suit in behalf of themselves and all other Choctaw descendants similarly situated, and with like claims and demands; and that petitioners' claims constitute a group, or common, claim.

2. The second amended petition was filed in the Indian Claims Commission under the provisions of the Act

of August 13, 1946, (60 Stat. 1040) and the jurisdiction of the Commission thereunder to hear claims contained in Sec. 2 thereof, (Appendix Exhibit D) and particularly fair and honorable dealings by the United States with the ancestors of your petitioners. The second amended petition contained alternative prayers, the first two prayers asking for judgment for the value of, to wit, 1,404,640 acres of land allotted as reservations under said Article 14, or in lieu thereof judgment in payment of script certificates issued in lieu of said lands, and the third alternative prayer asking that judgment be rendered against the United States in payment of the individual claims arising under said Article 14 in accordance with the obligations of the United States in the Treaty of June 22, 1855, (11 Stat. 611).

3. After a full hearing before the Indians Claims Commission, the Commission refused to grant petitioners relief under the first and second alternative prayers, but granted petitioners an award of $417,656.00 representing payment to only 191 heads of families instead of the heads of all the families as urged by petitioners herein. The Commission held that petitioners' claims for the balance were res judicata because of the opinion and judgment of this Court in *The Choctaw Nation* v. *The United States*, 21 Ct. Cls. 59, and *Choctaw Nation* v. *United States* and *United States* v. *Choctaw Nation*, 119 U. S. 1.

After the entry of an interlocutory award in that amount by the Commission, the Choctaw Nation moved to intervene in the case, which motion petitioners opposed, and the Commission denied intervention. The said award was made final and the United States and the Choctaw Nation filed appeals to the United States Court of Claims and petitioners filed a cross appeal on their first and second alternative prayers in the said second amended petition.

4. In its opinion, the Court of Claims states that a relatively large number elected to remain in their old homes and take advantage of the provisions of Article 14; that practically all were prevented from securing their reservations by the corrupt and dishonest behavior of the United States agent authorized to receive their notices of intention to remain in Mississippi. The Act of August 23, 1842, (5 Stat. 513) provided that where it was determined that an Article 14 claimant was found entitled to a reservation of land for which a patent *should have been issued*, but the land had already been sold to a white person by the United States, certificates of script should be issued to the Indian reservee for entry at private sale on any public land in Mississippi, Louisiana, Alabama, or Arkansas. The Act provided that "not more than one-half of which (scrip) shall be delivered to said Indian *until after his removal to the Choctaw territory west of the Mississippi River*," (italics supplied). Certificates or scrip for approximately 700,000 acres of land, or one-half the total amount found due this group, were delivered to them, the script having a supposed value of $1.25 per acre, which many of the owners sold for an average price of less than 17c per acre. The remaining half of the scrip was never delivered to the Indians, but was later paid to 1150 Article 14 heads of families, or to their heirs or legal representatives, in the sum of $871,000, and the Choctaw Nation executed a release under the provisions of an Act of Congress passed on July 21, 1852 (10 Stat. 15, 19). In addition, there were 191 heads of families who did not receive land or scrip.

5. In pursuance of the eleventh article of the 1855 Treaty, June 22, 1855 (11 Stat. 611, 613), the questions submitted to the Senate of the United States were answered by a Resolution of the Senate passed on the 9th of March, 1859, as follows:

"RESOLVED, That the Choctaws be allowed the proceeds of the sale of such lands as have been sold by the United States on the first day of January last, deducting therefrom the costs of their survey and sale, and all proper expenditures and payments under said Treaty excluding the reservations allowed and secured, and estimating the scrip issued in lieu of reservations at the rate of $1.25 per acre; and further, that they be also allowed twelve and a half cents per acre for the residue of said lands."

119 U. S. 1, pp. 23-24.

On the same day the Senate of the United States also adopted a Resolution for the purpose of ascertaining the amount due the Choctaw Nation under their award, and in the Resolution it was resolved that the Secretary of the Interior cause an account to be stated with the Choctaws showing what amount is due them.

6. By the Act of March 3, 1881, (21 Stat. 503), the Court of Claims was granted jurisdiction to "try all questions of difference arising out of treaty stipulations with the Choctaw Nation, and to render judgment thereon; * * *." A suit was filed by the Choctaw Nation against the United States reported in 21 Ct. Cls. 59, in which the Court rejected the claims made on behalf of the 1150 Article 14 claimants holding that they were bound by the release signed by the Choctaw Nation under the said Act of 1852. The Court further held that the 191 heads of families who had not received land or scrip were not bound by the release and should have judgment for the value of the land they lost at the rate of $1.85 per acre, or a total of $417,656. On cross appeals by both parties to this Court the judgment of the Court of Claims was reversed in 119 U. S. 1. This Court held that the 1881 Act operated to reopen the Senate award and the questions decided by it, only as far as it cast upon the Government the burden of disproving the justness and fairness of the award. This Court

held that the Senate award should be the basis for judgment on the subject in dispute. The opinion of the Court below in the case at bar admits that the decision of this Court in 119 U. S. 1, "had the effect of completely reversing the holding and judgment of the Court of Claims that the 1150 heads of families who received scrip under Article 14 of the 1830 Treaty were bound by the 1852 release and therefore entitled to nothing;" but petitioners contend that said decision of this Court did not hold that the 191 heads of families were not entitled to $417,656, and these petitioners further contend that the decision of this Court in 119 U. S. 1, does not hold that the 1150 and 191 heads of families, respectively, were entitled to share in the final judgment of $2,858,798.62, their claims remaining undisposed of.

7. The decision of the Court below in the case at bar loses sight of the fact that the Senate award excluded the reservations allowed and secured. The fact that the claims under Article 14 were excluded by the Senate and deducted by the United States before the Senate award, shows conclusively that the Senate did not take into consideration the claims of the Mississippi Choctaws who remained after the Treaty of September 27, 1830, and it could not because they remained in Mississippi and the award of the Senate only adjudicated the claims of the Choctaw Nation under the Treaty of September 27, 1830 because the Choctaw Nation moved to Oklahoma and the ones who remained were Mississippi Choctaws which were a body separate and apart from the Choctaw Nation which moved to Oklahoma. *The right to the land under Article* 14 was obtained only by staying in Mississippi and not moving to Oklahoma. (Italics ours) The Choctaw Nation had no right to plead the claims of the Mississippi Choctaws under Article 14 in the second amended petition filed in 21 Ct. Cls. 59, and that being so, this Court will not hold the Mississippi Choctaws

(those who remained—Choctaws east of the Mississippi River) bound by the litigation in 21 C. Cls. 59 nor the appeal in 119 U. S. 1. It has been erroneously contended below that although the Mississippi Choctaws did not move under the provisions of Article 14 of said Treaty, they still were members of the Choctaw Nation, but it will be noted from the provisions of that Article that they did not lose the privilege of a Choctaw citizen, "but *if they ever remove* are not to be entitled to any portion of the Choctaw annuity," (italics ours). That meant that they had to rejoin, or regain their membership in the Choctaw Nation. After the passage of the Indian Claims Commission Act petitioners herein filed their suit as the representatives of their ancestors who were entitled to reservations of lands under said Article 14 and who did not move under said Article 14. Under said Article, therefore, they were entitled to the lands agreed to be given them by the United States. It is erroneous to hold as was held by the Commission and the Court of Claims that the litigation in 21 Ct. Cls. 59 and the holding in the appeal in 119 U. S. 1, is binding upon petitioners herein. They never filed a suit in their own names until the suit was filed under the said Act, *supra*.

8. As the net proceeds judgment (designated as a result of the litigation in 21 Ct. Cls. 59) was a judgment for the Choctaw Nation, less the balance due on the reservations given in Article 14 of said Treaty, it was not claimed in the first and second alternative prayers of the second amended petition that petitioners did not receive their share of the net proceeds judgment, but was claimed in the third alternative prayer of said petition in the event it was held that petitioners' ancestors remained members of the Choctaw Nation after the 1830 Treaty and that the Senate award included the reservations in said Article 14. The Court below held that it was not proven by petitioners that the Government failed to do

all that it was required in good conscience to do by way of assuring that the individual Article 14 claimants received their pro rata share of the net proceeds judgment. The Court below in this respect failed to apply the terms of Article 14 which were that the *heads of families and their children, not the Choctaw Nation as such*, were to get the reservations of land therein specified. The Choctaw Nation as a body *did not get reservations of land* in Article 14, nor could it because the Choctaw Nation *moved* from Mississippi to Oklahoma and the act of moving released the United States from giving it land under said Article 14. There is a conflict, therefore, between the act of staying in Mississippi and the act of moving from Mississippi to Oklahoma. The Court below held that although the heads of families and their children stayed, they were entitled to their pro rata share in the net proceeds judgment. Because of their not moving to Oklahoma, they were not entitled to their pro rata share thereof but are entitled to the balance remaining unpaid for said reservations. This holding of the Court conflicts with the terms of said Article 14, (Italics ours).

The findings of the Indian Claims Commission that none of the 191 heads of families or their decendants received their share of the net proceeds judgment was supported by the best evidence received by the said Commission, it being shown by the *records of the United States* that they did not. The Court below said it was of the *opinion* that same was not supported by substantial evidence, but said Court did not give any reasons as to why it was not so supported. (Italics ours)

9. It is petitioners' contention that neither the special jurisdictional Act of March 3, 1881, (21 Stat. 504) nor the 1855 Treaty, included the land given to petitioners' ancestors under said Article 14 because the land was given outright to them by the United States under the 1830 Treaty and the provisions of Article 14 of the 1830

Treaty were vested rights in petitioners which the United States could not take away from them.

10. Article 12 of the 1855 Treaty provided in part that payment should be made under the direction of the United States agent. It was the duty of said agent to direct that payments be made to Article 14 claimants in Mississippi when the net proceeds judgment was being paid, but he did not perform that duty. There was no evidence offered in the case at bar that said agent did so. This provision in the Article certainly meant that the Government agent saw to it that Choctaws in Mississippi, as well as Oklahoma, got their share in payment of the net proceeds judgement. As the United States had only partially paid the claims under Article 14 in Mississippi at the time the net proceeds judgment was paid, it should have withheld from the payment of that judgement what it owed the Mississippi Choctaws and paid them direct. It knew that it had not fully paid for the reservations in Article 14, even though it had obtained a release in full payment, which, in fact, it obtained by paying only a portion of what the reservations of land under Article 14 were worth. Section 2 of the Indian Claims Commission Act of 1946 gives the right to sue the United States where there have not been fair and honorable dealings, and the case at bar was filed on that ground.

Intervention of Choctaw Nation

As the reservations were given to petitioners' ancestors who did not move with the Choctaw Nation to Oklahoma, the Court of Claims erred in permitting the Choctaw Nation to intervene herein.

Statutes Involved

The statutes involved are:

Treaty of 1830 (7 Stat. 333)
Treaty of June 22, 1855 (11 Stat. 611, 613)
Act of August 23, 1842 (5 Stat. 513)
Act of July 21, 1852 (10 Stat. 15, 19)
Resolutions of United States Senate, March 9, 1859
Act of March 3, 1881 (21 Stat. 504)
Indian Claims Commission Act, August 13, 1946, (60 Stat. 1049)

Questions Presented

1. Are the Choctaws East of the Mississippi River entitled in their own right under the Indian Claims Commission Act (of 1946) to the lands promised by the United States under Article 14, 1830 Treaty, or was such right in the Choctaw Nation?

2. Did title to the lands promised in Article 14 of the 1830 Treaty vest in petitioners' ancestors or the Choctaw Nation?

3. Did the United States have the legal or equal right to breach the terms of said Article 14 by only partially performing the terms thereof?

4. Has the United States fully performed its duties to petitioners' ancestors in its role as guardian or trustee for them?

5. Has the Indian Claims Commission Act of 1946 been properly contrued and applied by the Indian Claims Commission and the United States Court of Claims?

6. Did the decision of this Court fully compensate petitioners' ancestors under Article 14 and is that decision res judicata against petitioners herein?

7. Have there been fair and honorable dealings between the United States and petitioners' ancestors?

BRIEF

Reasons Relied on for Allowance of the Writ

The writ should issue for the following reasons:

1. The United States Court of Claims erred in holding that petitioners' ancestors were bound by the decision of this Court in 119 U. S. 1, and that they shared what the Choctaw Nation was paid under the judgment rendered by it on the mandate of this Court on said decision. This Court held therein that the Senate award was the right and justice of the matter, but as that award excluded consideration of the reservations granted in said Article 14, there was no decision of this Court on the reservations given in said Article 14. The United States Court of Claims erred in reading into the decision in 119 U. S. 1, an adjudication of the reservations granted in said Article 14.

2. This Court decided 119 U. S. 1, purely on legal and equitable grounds and not on the moral obligations of the United States which are contained in the Indian Claims Commission Act of 1946. The release by the Choctaw Nation was a legal release but not a moral release. The United States settled the claims under said Article 14 for approximately one-half it owed petitioners' ancestors, and it is morally bound to pay the balance to petitioners under the Indian Claims Commission Act of 1946.

3. The reservations of land in said Article 14 were given to those who remained in Mississippi. The Choctaw Nation could not get the reervations because it removed as such to Oklahoma. It had no right whatsoever to include same in the suit in 21 C. Cls. 59, because at the time of filing of that suit petitioners' ancestors were living in Mississippi, and the Choctaw Nation has no right to file the said suit in their behalf or to their use.

The title to the reservations vested in petitioners' ancestors and not in the Choctaw Nation. By moving to Oklahoma the Choctaw Nation divested itself of title to the reservations under said Article 14.

4. The terms of Article 14 were clear and a solemn promise to give lands to those who remained. By the acts of the agent of the United States, as aforesaid, the terms of Article 14 were breached. The United States legally and equitably breached the promise it made in said Article 14, and it has only paid $871,000.00 for breach of the terms of said Article 14.

5. The United States was the guardian or trustee of petitioners' ancestors and it was the duty of the United States to deliver the lands to them as their guardian or trustee.

6. The Indian Claims Commission Act of 1946 is a relief statute and based upon moral obligations of the United States. The Indian Claims Commission did not properly construe nor apply the "fair and honorable dealings" provision in Section 2 of said Act. The Commission held that the prior litigation in 21 Ct. Cls. 59 and 119 U. S. 1, was res judicata and that the matter of the right to the reservations could not be gone into again under the Indian Claims Commission Act of 1946. We contend this was error and that petitioners did not litigate their claims prior to the filing of their suit herein and that the Choctaw Nation had no right to litigate their claims.

7. This Court in 119 U. S. 1, confirmed the Senate award which had not adjudicated petitioners' reservations and excluded them. This Court did not rule upon petitioners' claims herein and petitioners herein respectfully request this Honorable Court to review the opinion of the United States Court of Claims in view of the decision of this Court in 119 U. S. 1.

8. The Court of Claims in its opinion of January 31, 1956, erred in failing to rule on the ground of fair and honorable dealings provided in Section 2 of the Indian Claims Commission Act of 1946. This provision is a new law and a moral ground under which any Indians in the United States, who have not been fairly and honorably dealt with by the United States, may for the first time sue the United States on said ground. If the prior litigation did not dispose of their claims on said ground, but disposed of same on legal or equitable grounds, the said Indians have the right to sue the United States under said Act of 1946 and have the right to an adjudication on that ground, which the Court of Claims erred in failing to or doing in the instant case, the said Court adjudicating the rights of petitioners herein under the said special jurisdictional Act of 1881.

See Cherokee Nation v. United States, 270 U.S. 476; 46 S. Ct. 428;
Litchfield v. Crane, (Litchfield v. Goodnow, 123 U. S. 549); and
Dull, et al., v. Blackman, et al., 169 U. S. 243.

The appellees' motion for rehearing in the Court below was overruled by the Court on April 3, 1956.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U. S. CODE, Section 1255.

On July 2, 1956, Mr. Justice Hugo L. Black extended the time for filing Petition for Writ of Certiorari herein to and including July 23, 1956.

It is, therefore, respectfully requested that the writ should issue in the case at bar, in order that equity and justice may be done.

Respectfully submitted,

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APPENDIX

Exhibit A

IN THE

UNITED STATES COURT OF CLAIMS

Appeals Docket No. 2-55
(Decided January 31, 1956)

JOSEPH CHITTO, ET AL., MEMBERS, AND AS THE REPRESENTATIVES OF, AND ON THE RELATION OF, THE CHOCTAW INDIANS EAST OF THE MISSISSIPPI RIVER v. THE UNITED STATES

THE UNITED STATES v. JOSEPH CHITTO, ET AL., MEMBERS, AND AS THE REPRESENTATIVES OF, AND ON RELATION OF, THE CHOCTAW INDIANS EAST OF THE MISSISSIPPI RIVER

APPEAL OF THE CHOCTAW NATION FROM ORDER OF THE INDIAN CLAIMS COMMISSION DENYING MOTION FOR LEAVE TO INTERVENE

Mr. Robert C. Handwerk for Joseph Chitto, et al. *Mr. William T. Weir* was on the briefs.

Mr. Curtis C. Shears, with whom was *Mr. Assistant Attorney General Perry W. Morton*, for the United States.

Mr. W. F. Semple for the Choctaw Nation.

ON APPEALS FROM THE INDIAN CLAIMS COMMISSION

LITTLETON, *Judge*, delivered the opinion of the Court:

This case involves cross appeals from the final determination of the Indian Claims Commission entered in Commission Docket No. 52, February 3, 1955 (3 Ind. Cls. Com. 288), denying the petitioners' first and second alternative prayers for relief and awarding judgment in the sum of $417,656 on the third prayer. There is also before the Court the appeal of the Choctaw Nation from the Commissioner's order of January 24, 1955, denying the Nation's motion for leave to intervene.

Petitioners below brought suit under Section 2 of the Indian Claims Commission Act (60 Stat. 1049) as the "representatives of, and on the relation of, The Choctaw Indians East of the Mississippi River", alleging that, as the descendants of those Choctaw Indians who qualified for benefits under Article 14 of the Treaty of September 27, 1830 (7 Stat. 333), they are entitled to an award representing the value of the land in Mississippi which their ancestors were entitled to but did not receive; or, in the alternative, that they are entitled to an award representing the value of the scrip certificates issued by the United States in lieu of said lands; or that judgment should be rendered in their favor in payment of the individual claims arising under Article 14 of the 1830 treaty in accordance with the obligations of the United States under the Treaty of June 22, 1855, 11 Stat. 611.

In denying petitioners' claims to the value of the land or scrip under Article 14 of the 1830 treaty, the Indian Claims Commission held that the rights of all Article 14 claimants had been finally determined in the case of *The Choctaw Nation* v. *The United States*, 21 C. Cls. 59, reversed 119 U. S. 1. The Indian Claims Commission interpreted the decision of the Supreme Court in that case as holding that all claims of individual Choctaws under Article 14 of the 1830 treaty must be denied except the claims of 191 heads of families who had qualified for Article 14 benefits but had received neither land nor scrip,

and that such group of claimants were entitled to receive $417,656 out of the total award made to the Nation. The Indian Claims Commission held that the judgment of the Court of Claims entered on the mandate of the Supreme Court is *res judicata* on the issues raised by the instant claims of the petitioners for the value of the Article 14 land and scrip, and also as to the amount to which the 191 heads of families were entitled; but that since the Chitto group had, in the opinion of the Commission, established that no part of the Court of Claims judgment of $417,656 was ever paid to the individual descendants of the 191 heads of families, the Chitto group should have an award in that amount because the Government was under an absolute obligation to see to it that the award was actually paid over to the proper individual claimants.

The Chitto group, petitioners below, urge that while the Indian Claims Commission was correct in holding that the $417,656 judgment of the Court of Claims had never been paid to those entitled thereto and judgment therefor should be awarded in that amount, the Commission erred in holding that the decisions of the Court of Claims and the Supreme Court, *supra*, were *res judicata* as to the issues involved in the first and second alternative prayers of the Chitto group petition.

The Government appeals from the final determination of the Indian Claims Commission awarding $417,656 to the Chitto group, urging that the Commission erred (1) in holding that the petitioners constituted an identifiable group of Indians entitled to bring suit under the Indian Claims Commission Act, *supra;* (2) in holding that the Government was liable for any possible failure of the Choctaw Nation to pay over the $417,656 judgment to the Article 14 Individual claimants entitled thereto; and (3) in denying the Government's motion for a rehearing on the basis of newly discovered evidence allegedy tending

to establish that the Choctaw Nation had actually made payments to the individual Article 14 claimants.

The Choctaw Nation appeals from the final order of the Indian Claims Commission denying the Nation's motion for leave to intervene, urging that under the Treaty of June 22, 1855, *supra*, the Choctaw Nation had the primary responsibility for seeing that the judgment of the Court of Claims was distributed among the various claimants entitled to a pro rata share thereof; that the Choctaw Nation is prepared to show from documentary and oral evidence that the Article 14 claimants actually received payment of the portion of the judgment to which they were entitled; that unless the Choctaw Nation is permitted to intervene, it will be adversely affected by a judgment rendered against the United States because the Government has indicated its intention to satisfy any such final judgment out of funds of the Choctaw Nation on deposit in the United States Treasury. In our opinion the Choctaw Nation had a sufficient interest in the claims made before the Commission to entitle it to intervene and its appeal from the order of the Commission is sustained.

In order to understand the basis for the final determination of the Indian Claims Commission and to decide the various issues raised by the three appeals, it is necessary to consider the facts established by the record in this case and the effect of the decision of the Supreme Court, *supra*.

By the terms of the Treaty of October 18, 1820, 7 Stat. 210, the Choctaw Nation, then living in the State of Mississippi, ceded to the United States a portion of its land in that State in exchange for a tract of land west of the Mississippi River situated between the Arkansas and Red Rivers, "where all who live by hunting and will not work may be collected and settled together." Article 4 of that Treaty provided that boundaries established be-

tween the Choctaw Indians and the United States east of the Mississippi River should remain unchanged until the Indians remaining in Mississippi should become so civilized as to be made citizens of the United States and that at that time Congress would lay off limited parcels of land in Mississippi for the benefiit of each family or individual of the Nation.

By the Treaty of January 20, 1825, 7 Stat. 234, it was provided that Congress would not exercise its power of apportioning lands in Mississippi for the benefit of Choctaw families or individuals without the prior consent of the Choctaw Nation.

Because of the increasing demands for land by white settlers, the United States came to the conclusion that it would be best to remove the whole body of the Choctaw Nation to their land west of the Mississippi River and with that in mind, the Treaty of September 27, 1833, 7 Stat. 333, was negotiated. By the third article of that treaty the Choctaw Nation ceded to the United States all the lands which they owned east of the Mississippi River and agreed to remove to their lands beyond that river as soon as practicable. No provision was made for payment for such ceded lands except to a limited extent in Article 19. In order to induce the nation to consent to such cession and removal, the United States was forced to enter into certain stipulations on behalf of those Choctaw Indians who did not wish to leave their homes in Mississippi and also on behalf of other members of the Nation who were willing to remove but who had been living on land which they had improved and felt they should be paid for their improvements before removal.

Accordingly, Article 14 of the 1830 treaty provided that the head of every Choctaw family who desired to remain in Mississippi and become a citizen of the United States might do so and thereupon become entitled to a reservation of 640 acres of land for himself, an additional

320 acres for each unmarried child over ten years of age living with him, and an additional 180 acres for each child under ten years of age, the tracts to be adjacent in location. The Article further provided that if the Indians resided on the land for five years after the date of ratification of the treaty, intending to become citizens of the United States, a grant in fee simple would be issued to them. The last sentence in the Article provided:

> Persons who claim under this article shall not lose the priviledge [sic] of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity.

Article 19 provided, among other things, that Choctaw heads of families who were willing to remove west and who had made improvements in their lands east, should be paid therefor at the rate of fifty cents per acre.

The treaty also provided for the payment of annuities to the tribe, the payment of removal expenses, payment for cattle which the United States agreed to buy, the education of a limited number of Choctaw children, the furnishing of blacksmiths and a mill wright for a limited time, and the furnishing of blankets, rifles and ammunition to each warrior who might remove west.

Although great pleasure was brought on the Choctaws to induce their removal west, a relatively large number elected to remain in their old homes and take advantage of the provisions of Article 14. Practically all were prevented from securing their reservations by the corrupt and dishonest behavior of the United States agent authorized to receive their notices of intention to remain in Mississippi. As a result of the actions of this Government agent, only 143 heads of families actually succeeded in securing their reservations of land under Article 14 and approximately 1,200 other heads of families with their children were driven from their farms which were subsequently sold by the Government to white settlers.

On March 3, 1837, Congress passed an act (5 Stat. 180) providing for the appointment of commissioners to investigate and adjust the claims of these unfortunate Mississippi Choctaws to their Article 14 reservations. The life of this commission was extended by subsequent acts, including the Act of August 23, 1842 (5 Stat. 513), which provided that in cases where it was determined that an Article 14 claimant was found entitled to a reservation of land for which a patent should have been issued but the land had already been sold to a white person by the United States, certificates of scrip should be issued to the Indian reservee for entry at private sale on any public land in Mississippi, Louisiana, Alabama, or Arkansas. The act provided that "not more than one-half of which [scrip] shall be delivered to said Indian *until after his removal to the Choctaw territory west of the Mississippi River.*" [Italics supplied.] Delivery of the scrip was entrusted to the Secretary of War who, despite the provision in the act that one-half of the scrip might be delivered prior to removal, made the removal of the claimants a condition precedent to the delivery of *any* part of the scrip certificates.

The commissioners appointed under the above acts found that approximately 1,150 heads of families had qualified for Article 14 reservations but that the land to which they were entitled and the improvements thereon had been sold to others by the Government. Consequently, certificates for approximately 700,080 acres of land, or one-half the total amount found due this group, were delivered to them, the scrip having a supposed value of $1.25 per acre. However, because the scrip was not delivered until the Indian claimant had moved west of the Mississippi where the scrip could not be used to purchase land many of the owners of the scrip sold it for an average price of less than 17 cents per acre. The remaining half of the scrip was never delivered to the Indians, but

pursuant to the Act of March 3, 1845, 5 Stat. 766, 777, was funded and carried interest of five percent to be paid annually to the individual reservees under Article 14 of the 1830 treaty, or to their heirs, the scrip receiving an arbitrary value of $1.25 per acre. On July 21, 1852, Congress passed and act (10 Stat. 15, 19) providing that after June 30, 1852, all payments of interest on the funded scrip should cease; that the Secretary of the Interior should pay the individual claimants the amount of the principal awarded in each case in an aggregate amount not to exceed $872,000, and that final payment and satisfaction of the awards should first be ratified and approved as a "final release of all claims of such parties under the fourteenth article of said treaty [1830], by the proper national authority of the Choctaws, * * *." Such a release was executed by the Choctaw Nation on November 6, 1852, and approximately $871,000 was paid to the 1,150 Article 14 heads of families who had been found entitled to scrip, or to their heirs or legal representatives.

The commissioners appointed to investigate the Article 14 claims also found that 191 heads of families had attempted to comply with the terms of Article 14 and were prevented from doing so by the actions of the Government. The commissioners denied their claims, however on the basis of a provision in the 1842 act, *supra*, which required, as the treaty did not, that the claimants must reside on their improvements for the full term of five years. These 191 claimants did not receive land or scrip.

Because of the dissatisfaction of the Choctaw Nation with the manner in which the Government had carried out its undertakings under the 1830 treaty generally, and under Articles 14 and 19 in particular, the Nation by its legislative assembly created a delegation to settle all unsettled business with the United States. On June 22, 1855, the Choctaw Nation and the United States entered into a treaty (11 Stat. 611, 613) which provided, among

other things, for the settlement and adjudication of all claims or demands of the Nation or individual members thereof as follows:

Article 11. The government of the United States, not being prepared to assent to the claim set up under the treaty of September the twenty-seventh, eighteen hundred and thirty, and so earnestly contended for by the Choctaws as a rule of settlement, but justly appreciating the sacrifices, faithful services, and general good conduct of the Choctaw people, and being desirous that their rights and claims against the United States shall receive a just, fair, and liberal consideration, it is therefore stipulated that the following questions be submitted for adjudication to the Senate of the United States.

First. Whether the Choctaws are entitled to, or shall be allowed, the proceeds of the sale of the lands ceded by them to the United States, by the treaty of September the twenty-seventh, eighteen hundred and thirty, deducting therefrom the cost of their survey and sale, and all just and proper expenditures and payments under the provisions of said treaty; and if so, what price per acre shall be allowed to the Choctaws for the lands remaining unsold, in order that a final settlement with them may be promptly effected. Or,

Second. Whether the Choctaws shall be allowed a gross sum in further and full satisfaction of all their claims, national and individual, against the United States; and, if so, how much.

Article 12. In case the Senate shall award to the Choctaws the net proceeds of the lands, ceded as aforesaid, the same shall be received by them in full satisfaction of all their claims against the United States, whether national or individual, arising under any former treaty; and the Choctaws shall thereupon become liable and bound to pay all such individual claims as may be adjudged by the proper authorities of the tribe to be equitable and just—the settlement and payment to be made with the advice and under the direction of the United States agent for the tribe;

> and so much of the fund, awarded by the Senate to the Choctaws, as the proper authorities thereof shall ascertain and determine to be necessary for the payment of the just liabilities of the tribe, shall on their requisition be paid over to them by the United States. But should the Senate allow a gross sum, in further and full satisfaction of all their claims, whether national or individual, against the United States, the same shall be accepted by the Choctaws, and they shall thereupon become liable for, and bound to pay, all the individual claims as aforesaid; it being expressly understood that the adjudication and decision of the Senate shall be final.

Article 13 of this treaty provided that any balance remaining of the amount that should thereafter be awarded the Choctaw Nation by the Senate under Article 12 of the Treaty should, after satisfying the "just liabilities of the tribe" be held in trust for welfare and educational purposes of the Choctaw people and their descendants.

Thereafter, the claims of the Choctaws were submitted to the Senate of the United States, and on February 15, 1859, the Committee on Indian Affairs submitted its report and resolutions. The report discussed at lenght the various wrongs done this Nation by the United States under the 1830 treaty and concluded that the United States had defaulted in its obligations under Articles 14 and 19, as well as under certain other articles of the treaty. With respect to the Article 14 claims, the Senate found that the scrip and cash paid to the 1150 Article 14 claimants who had qualified for land but had never received it, did not adequately compensate those individual heads of families and that they were clearly entitled in equity and justice to an additional amount for the damage and loss sustained by them.[1] The Senate also found that 191

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[1] The Senate Report, at p. 15, stated as follows:

"* * * These 1,150 families lost their reservations, their homes, farms, and improvements altogether, and exclusively in consequence of the acts of ommission or commission of the officers of

heads of families had qualified for reservations under Article 14 and had received neither land, scrip nor money and were therefore entitled to be compensated for their losses.

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the United States. They were therefore entitled, in justice, to a *full* and complete indemnity. Their lands, partly improved, and naturally selected by them for their superior advantages of soil and situation, were worth, probably, much more than $1.25 per acre; perhaps, on an average, not less than five dollars and much of it still more.

"Evidently to affix an arbitrary, uniform price, and that the minimum price of public lands, on the lands and homesteads thus lost to the parties, and to compel them to take that minimum price or nothing, was no indemnity, even if the amount had been presently paid them in money. It certainly did not proceed upon the principle of ascertaining the true and real amount of their loss, and paying them that. If it was in any exceptional case really an indemnity, that result was of course accidental. That the United States chose to sell their lands for much less than their value, as it in no way lessened their loss, so it in no way set a limit to their right to indemnity.

"For example: In one case the claimant 'had a house and field in Patickfah, where he resided until four years after the treaty, when a white man (Waters) drove him off.' His land was sold August 25, 1835. His claim was allowed in 1846 by the late Governor Marcy who was then Secretary of War, and scrip was issued to him. It does not appear what he received for the scrip; but admitting that he realized $1.25 in money for every acre, it was still no sufficient indemnity. What he was entitled to was the undisturbed possession of his land and the right to sell it to whom, when, and at such price as he pleased. To turn him out of doors by selling it as public land in 1835, to retain the proceeds of sale for eleven years, and then pay them over to him without any allowance for the delay or the use of the money, or for the value of his improvements, or that of the land over and above the sum for which it sold, was very far from doing complete justice.

"By this mode of compensation, all claim was excluded for the value of the *improvements* of the parties, their clearings, buildings, orchards, and the like. Not a dollar was allowed for that; but only the minimum price of unimproved public lands. And no attempt was made to ascertain the *true* value of the lands themselves. * * *"

On the question of the actual value of the *land* and *improvements* which were lost by the Article 14 claimants the Senate stated at p. 15 of its report:

> Of course, it would at this remote day be utterly impracticable to ascertain the actual and real value of the improvements on lands which were the actual loss of the parties; and as to interest, the very magnitude of the item, exceeding, as it would in the aggregate, a million of dollars, would be likely to prove an insuperable bar to its allowance. If the lands and improvements of the reservees were worth, on an average, five dollars an acre, the difference between their value and their price at $1.25 an acre was over five millions of dollars.

On the problem of estimating the losses in the sale of scrip, the Senate stated at pages 15 and 16 of its report:

> Similar difficulties occur in considering the losses in the sale of scrip. In strict justice, it should be remembered that this scrip was made to serve a double purpose. It was used in compensation for land claims, and also as an inducement to emigrate to the Indian territory west, where most of it was delivered where it could not be located, and where, consequently, it was comparatively worthless. The Indian had either to sell it at a point remote from any market, or keep it as so much waste paper. Thus the service the scrip was required to perform as an aid to emigration lessened its value to the claimant. How far this cause operated in reducing the price below the regular market value, what that market value was, or how much the great body of the claimants really lost, are points which cannot now be determined. There is no doubt that the loss fairly chargeable to the government is considerable, but it would be impossible to fix the amount correctly.

The Senate then pointed out the difficulties of estimating the exact losses suffered by the Article 19 claimants and by claimants under other articles, and it concluded that the fairest method of awarding compensation would

be to pay the Choctaw Nation the "net proceeds" received by the Government for the Choctaw lands:

> It being thus impossible to ascertain to how much the Choctaws would be entitled, on a fair and liberal settlement, for the damage and loss sustained by them, it seems to the committee that the only practicable mode of adjustment is to give them the net proceeds of their lands, not on the ground that the letter of the treaty entitles them to it, but that it is the only course by which justice can now be done them. [Senate Report, p. 17.]

In the subsequent Senate Resolution, the two propositions submitted to the Senate by the Treaty of 1855, *supra*, were recited, and it was then resolved that an award be made on the basis of the first, i. e., the "net proceeds" proposition. The resolution making the award was in the precise terms of Article 11 of the 1855 treaty. It awarded the Nation the proceeds of the sale of lands sold by the United States, deducting therefrom the cost of survey and sale, and all proper expenditures and payments under the 1830 treaty. The resolution also provided that all reservations allowed and secured, or the scrip issued in lieu of reservations, should be taken into account at an estimated price of $1.25 per acre.

The Senate further resolved that the Secretary of the Interior should cause an account to be stated with the Choctaw Nation showing the amount due it according to the principles set forth in the resolution of the Senate.

The Secretary of the Interior stated an account in conformity with the resolutions and decision of the Senate by crediting the Nation with the proceeds of the sales of the lands ceded by them under the 1830 treaty, made up to January 1, 1859, adding an amount thereto for the unsold residue of such lands at the estimated value of 12½ cents per acre, the total amounting to $8,078,614.80, and deducting therefrom (1) the cost of the survey and sale

of the lands at ten cents an acre; (2) payments and expenditures made under the treaty, including the value of reservations actually allowed, and the value of the scrip issued in lieu of reservations not allowed, at the rate of $1.25 per acre, all as provided in the Senate resolution. This resulted in total deductions of $5,097,367.50. The final award was thus $2,981,247.30.

Following the Senate award, Congress, by an appropriation act of March 2, 1861 (12 Stat. 221, 238), made one payment thereunder in the sum of $250,000, but failed to make any further payments. By the act of March 3, 1881, 21 Stat. 504, the Court of Claims was granted jurisdiction to "try all questions of difference arising out of treaty stipulations with the Choctaw Nation, and to render judgment thereon; * * *." The jurisdictional act provided that the Court of Claims might review the entire question of differences *de novo* and should not be estopped by the Senate report and award made under the treaty of 1855.

The Choctaw Nation filed its petition in this court asking for judgment on the basis of the Senate award, after certain alleged errors had been corrected in the account stated by the Secretary of the Interior, or, in case the court should set aside the Senate award, judgment for the value of the Article 14 land plus interest thereon, or judgment for the proceeds received by the United States for Choctaw lands sold on the basis of a new accounting. In its decision, reported in 21 C. Cls. 59, this court held that the 1881 jurisdictional act deprived the court of the power to give any legal effect to the Senate award made under the 1855 treaty, accordingly, the court proceeded to consider all claims *de novo*.

The court rejected the claims made on behalf of the 1150 Article 14 claimants who had received scrip and money instead of land, holding that they were bound by

the release signed by the Choctaw Nation under the Act of 1852. The court further held that the 191 heads of families who had not received land or scrip to which they were entitled under Article 14 of the 1830 treaty, were not bound by the release and should have judgment for the value of the land they lost at the rate of $1.85 per acre, or a total of $417,656; that the claimants under Article 19 were entitled to $42,920; that $68,102 should be awarded the tribe for land taken by the United States as the result of an erroneous survey, and certain other sums awarded for transportation and subsistence under the 1830 treaty, for unpaid annuities, and for guns and ammunitions promised and not delivered to the Nation.

On cross appeals by the parties to the United States Supreme Court, the judgment of the Court of Claims was reversed (119 U. S. 1). The Supreme Court held that the 1881 act operated to reopen the Senate award and the questions decided by it, only so far as it cast upon the Government the burden of disapproving the justness and fairness of the award. The Supreme Court held further that the award of the Senate furnished the nearest approximation to the justice and right of the case which it was possible, after a lapse of time, for any court to reach. The Supreme Court thereupon held that the Senate award *rather than the facts found by the Court of Claims* should be the basis for judgment on the subject in dispute, except in the case of the Court of Claims' finding on the amount of unpaid annuities, ($59,449.32) and the court's finding as to the value of lands taken under the erroneous survey ($69,102).

The decision of the Supreme Court, thus had the effect of completely reversing the holding and judgment of the Court of Claims (1) that the 1,150 heads of families who received scrip under Article 14 of the 1830 treaty, were bound by the 1852 release and therefore entitled to nothing; and (2) that the 191 heads of families who received

nothing under Article 14 were entitled to a fixed amount, i. e. $417,656, as compensation for the land they should have received. *Both* groups were held to be entitled to share in the final judgment of $2,858,798.62 entered in the case which was based on the Senate award plus the two items of unpaid annuities and land taken by erroneous survey.

In arriving at the conclusion that the Chitto group were entitled to recover $417,656 as descendants of the 191 heads of families who were entitled to but never received land, scrip or money under Article 14 of the 1830 treaty, we are of the opinion that the Indian Claims Commission made two primary errors. First, we think that the judgment of the Court of Claims, entered on mandate of the Supreme Court, did not award any specific amount to Article 14 claimants, nor did the Supreme Court affirm the finding of the Court of Claims that of all the Article 14 claimants, *only* the 191 heads of families who received neither land, scrip nor money were entitled to any part of the judgment entered. On the contrary, the Supreme Court reversed the holdings and judgment of the Court of Claims, and necessarily, the findings on which they were based, including the holdings that those Article 14 claimants who had received money and scrip in lieu of land and on whose behalf the Choctaw Nation had executed a release on November 6, 1852, were entitled to nothing; and that the 191 heads of families who had not received land, scrip or money, were entitled to receive a fixed amount representing the value of the land they should have received, as of 1831.

The Supreme Court held that the Court of Claims should have adopted the February 15, 1859, report and award of the Senate made pursuant to the Treaty of June 22, 1855, which report stated that not only the 191 heads of families who had received nothing, but also the

1,150 heads of families who had received scrip and money in lieu of land, had failed to receive the full value of the benefits intended to be conferred on them by Article 14 of the 1830 treaty; that because of the difficulty of determining just how much those benefits were worth in addition to what the 1,150 had actually received by way of scrip and money, the fairest method of compensating the 1,150 heads of families and the 191 heads of families, was to permit them all to share in the net proceeds of the sale of the lands of the Nation in Mississippi which the tribe had ceded to the Government in 1830. The Supreme Court accordingly ordered the Court of Claims to enter a judgment for the Choctaw Nation in the exact amount of the Senate award, plus certain other items found by the Court of Claims and concurred in by the Supreme Court to be justly due the Choctaw Nation.

From the above it follows that if the judgment of the Court of Claims should have been paid by the Government to the Article 14 claimants directly, or if the Government was under an obligation to absolutely insure that the Article 14 claimants received their pro rata shares of that judgment, and failed to do so, than a much larger group than the descendants of the 191 heads of families would now be entitled to an award from the Indian Claims Commission.

However, it is our opinion that under the pleadings and on the record in this case, the petitioners below (the Chitto group) have failed to establish any right of recovery on the part of descendants of either the 191 heads of families or the 1,150 heads of families, because it has been neither alleged nor proved that the Government failed to do all that it was required in law or in good conscience to do by way of assuring that the individual Article 14 claimants received their pro rata share of the net proceeds judgment. In addition, we are of the opinion that the Commission's finding that none of the 191

heads of families or their descendants ever received any part of the net proceeds judgment is not supported by substantial evidence.

In holding that the Government was under a duty to insure that whatever was due the Article 14 claimants out of the Court of Claims judgment was in fact paid over to them, the Indian Claims Commission relies on the language of Article 12 of the 1855 treaty which provides in part as follows:

> In case the Senate shall award to the Choctaws the net proceeds of the lands, * * * the same shall be received by them in full satisfaction of all their claims against the United States, whether national or individual, arising under any former treaty; and the Choctaws shall thereupon become liable and bound to pay all such individual claims as may be adjudged by the proper authorities of the tribe to be equitable and just—*the settlement and payment to be made with the advice and under the direction of the United States agent for the tribe;* * * * [Italics supplied.]

It is undisputed that the final award of the Court of Claims was paid to the proper officials of the Choctaw Nation as required by the above quoted treaty article in connection with the Senate award. The 1855 treaty was with the Choctaw Nation and when Article 12 speaks of the "Choctaws" it has reference to the Choctaw Nation. Neither the special jurisdictional act of March 3, 1881, nor the 1855 treaty authorized payment to anyone but the Choctaw Nation.

In the 1855 treaty the Choctaw Nation agreed that it would accept payment from the United States of any award made by the Senate in full satisfaction of all of the claims which the tribe or its individual members had against the United States, and that the tribe would see to it that all individual claims were settled out of the award on a just and equitable basis. This included the

claims of the petitioners in this case. The Choctaw Nation further agreed that it would make such settlements and payments with the advice and under the direction of the United States agent for the tribe. Nowhere in the article or elsewhere in the treaty or Act of Congress is there a promise by the United States to the individual claimants that it would absolutely insure their receiving payment according to a just and equitable settlement. All the undertakings in above-quoted portion of Article 12 appear to us to run from the Choctaw Tribe to the United States and consist of an agreement to accept the award in settlement of all national and individual claims of the Choctaws against the United States, and to become liable as a Tribe for the payment of individual claims, but to consult with the United States agent for the Tribe in carrying out such undertakings, and to proceed in such manner as he might direct. This cannot be interpreted as a promise by the United States that it would itself pay the individual claimants or that its agent would himself do so or personally see to it that each individual claimant was awarded the proper amount by the Tribe and paid that amount. Neither the Senate award nor the judgment of the Court of Claims entered on mandate of the Supreme Court determined the separate amounts that should go to individual claimants, that being left up to the proper authorities of the Choctaw Nation.

There is nothing in the record in this case to establish or to indicate that the United States agent induced or even knew of any unfair settlements or denials of just individual claims, or knew or had any part in, any failure on the part of the Tribe to pay individual claimants justly entitled to share in the award.

The record before the Commission also fails to establish the fact found by the Commission that the individual claimants under Article 14 entitled to share in the final judgment entered by the Court of Claims, as de-

scendants of the 191 heads of families, were not in fact paid their share of such judgment. The Commission's finding that such claimants were not paid by the Choctaw Nation is supported only by evidence that no record of such individual payments exists in the records of the office of the United States Commissioner of Indian Affairs, Department of the Interior, or is shown by the report of the General Accounting Office. There is no evidence of fraudulent practices on the part of the authorities of the Choctaw Nation. The Commission also relies on a *dictum* expressed in the case of *Jack Amos, et al.* v. *Choctaw Nation*, issued by the United States Courts in the Indian Territory in Citizenship cases. That decision involved an appeal from a decision of the Dawes Commission concerning the right of citizenship in the Choctaw Nation of Jack Amos and others. The cases did not involve the questions presented here, and we can give the *dicta* no weight.

Statements by Government officials that Government records contain no evidence of payment to individual claimants under Article 14 from the Court of Claims judgment does not, we think, establish that such payments were not in fact made. As pointed out by the Government and by the Choctaw Nation, the Choctaw Nation was obligated to make such payments and records of such individual payments would be in the archives of the Choctaw Nation and not in the records of the Indian offices of the United States Government.[2]

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[2] At the time of the entry of the judgment of the Court of Claims on mandate of the Supreme Court, December 15, 1886, and for many years prior thereto, the Choctaw Nation, a civilized tribe of Indians, had a full tribal government organized along the lines of the Government of the United States. Immediately following the making of the net proceeds award by the United States Senate in 1859, the governing body of the Choctaw Nation passed an act creating a Choctaw Court of Claims to adjudicate the claims of individual claimants under the 1830

We think that in order to establish a cause of action and a right to recover from the United States in the instant case, petitioners had the burden of alleging and proving that they were entitled to be paid by the United States; that the Choctaw Nation, to which, under the terms of the 1855 treaty and the judgment of the Court of Claims on mandate of the Supreme Court, the amount of the judgment was paid, wrongfully refused to pay them, and that the United States under whose direction payments were made (see footnote below), knew or should have known that the Choctaw Nation was wrongfully withholding payment from individual claimants rightfully entitled to such payments. In the absence of such allegations and of any proof to that effect, the Chitto group has failed to establish its right to any award whatsoever.

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treaty, to audit those claims and pay out the money which should be appropriated by the United States Congress to individual claimants found by the Choctaw Court entitled to share in the net proceeds award. Although the United States Government, because of the commencement of the Civil War, made only one payment of $250,000 under that Senate award, the tribal claims court continued to adjudicate the claims of individual claimants. By the time of the passage of the 1881 jurisdictional act referring the matter of the Senate award to the United States Court of Claims, most of the individual claims had been adjudicated. Following the judgment of the United States Court of Claims in 1886, the General Council of the Choctaw Nation passed an act, November 6, 1888, providing for the creating of a new claims commission of three commissioners to ascertain the identity of the legal heirs of the individual claimants who had been found by the Choctaw Court of Claims to be entitled to share in the Senate award. This commission was authorized to issue certificates for the amount of the claims to the persons entitled thereto. It provided that the Indian Agent for the Five Civilized Tribes should be the Fiscal Agent for the tribe and pay the certificates out of the net proceeds judgment money. This tribal commission continued in existance until all individual claims were adjudicated and settled and the final report of the fiscal agent of the Choctaw Nation (acting under bond) was accepted in 1889 by the Choctaw governing body. By that time the entire judgment had been paid out except for approximately $22,000.

For the purposes of the record, the appeal of the Choctaw Nation is sustained and the decision of the Indian Claims Commission denying its petition to intervene is reversed.

We do not find it necessary to go to the question of whether or not the Chitto group is an identifiable group entitled to sue under the terms of the Indian Claims Commission Act, or the question of whether the Commission erred in refusing to grant the Government a rehearing on the question of payment.

The final determination and award of the Indian Claims Commission in favor of the petitioners below and its order denying the motion of the Choctaw Nation for leave to intervene are reversed, and the cause is remanded with instructions to enter an order permitting the intervention of the Choctaw Nation and to enter judgment dismissing the petition in conformity with this opinion.

LARAMORE, *Judge*; MADDEN, *Judge*; WHITAKER, *Judge*; and JONES, *Chief Judge*, concur.

Exhibit B

BEFORE THE
INDIAN CLAIMS COMMISSION

Docket No. 52

JOSEPH CHITTO, WILL JIMMIE, EMETT YORK, BAXTER YORK, JACKSON ISAAC, MOSE THOMPSON, ANDERSON TUBBE, DEMPSEY MORRIS, IRA JOHN, MOLY TUBBY, BYRD ISAAC, NICHOLAS BELL, TOM BEN, and DICK TUBBY, *Petitioners*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

SECOND AMENDED PETITION.

1. Petitioners, Joseph Chitto, Will Jimmie, Emett York, Baxter York, Jackson Isaac, Mose Thompson, Anderson Tubbe, Dempsey Morris, Ira John, Moly Tubby, Byrd Isaac, Nicholas Bell, Tom Ben, and Dick Tubby, members, and as the representatives of, and on the relation of, the Choctaw Indians East of the Mississippi River, by their attorneys, file this second amended petition by leave granted by the Commission, and respectfully state, as follows:

2. Jurisdiction of the Commission is found in the Act of August 13, 1946, (60 Stat. 1049).

3. That the Choctaw Indians East of the Mississippi River are an identifiable group of Indians composed of all Indians who were residing in the State of Mississippi on September 27, 1830, and their descendents now living, and who did not move West after the treaty of Septem-

ber 27, 1830 (7 Stat. 333), but who remained in Mississippi and became entitled to lands under Article 14 of said treaty, and elected to take advantage of the provisions of said article. That petitioners and those in whose behalf this amended petition is filed, are descendants of said Indians who resided in Mississippi on said date, and bring this suit to recover as successors to said group. That they bring this suit in behalf of themselves and all other Choctaw descendants similarly situated, and with like claims and demands. That petitioners' claims herein constitute a group, or common, claim. That said identifiable group has been so recognized by the United States Court of Claims, as reservees, or claimants, entitled to an award of $417,656.00 under Article 14 of said treaty as reported in 21 Ct. Cls. 59. That further, Congress appropriated $872,000.00 principal, with interest, by the Act of July 21, 1852, (10 Stat. 15), to pay said group, or their descendants, under the provisions of said Article 14 for the principal due for the second half of the scrip authorized by the Act of March 3, 1845, (5 Stat. 777), which was never paid to said group, or their descendants. That petitioners' claims are separate and apart from the Choctaw Nation, which moved West after said treaty. That the Choctaw Nation never had authority to act for your petitioners and their ancestors, or those in whose behalf this petition is filed, for or on account of any claims herein demanded, which defendant well knew.

4. That S. 1478, (a bill to confer jurisdiction on the Court of Claims), was heretofore passed by Congress for adjudication of the above-mentioned claims, but vetoed by President Roosevelt on June 25, 1939; that said claims are not, nor any part thereof, included in any suit pending in the Court of Claims, or in the Supreme Court of the United States; and that the same has not been filed in the Court of Claims under any legislation in effect

on the date of the approval of the Indian Claims Commission Act.

5. Petitioners herein, as the representatives, descendants, and successors to said group, who are the reservees, and or entitled to allotments under Article 14 of the Treaty of 1830, (7 Stat. 333—2 Kapp. 310) demand payment for the value of, to wit, 1,404,640 acres of land, with improvements, to which they became entitled under said article, and allotted as reservations thereunder to those heads of families, and their children, who desired to remain East of the Mississippi River. That said group elected to and did remain East of the Mississippi River, and continued so to remain, and complied with the provisions of said article. That the defendant totally failed and refused to deliver said reservations, or allotments, of, to wit, 1,404,640 acres of land, and failed and refused to pay the persons entitled thereto the value of said lands. That the defendant failed to carry out its duty to perform its promises and agreements under said article of the treaty. That the defendant illegally disposed of said lands to those not entitled thereto in derogation of the promises made therein.

6. That later, by Act of Congress dated August 23, 1842 (5 Stat. 513), the defendant, without the consent, or agreement of said reservees to so amend the provisions of said article 14 of the treaty, passed a law amending said article by providing that said reservees, or allottees, should receive certificates of scrip, because the said defendant had already disposed of the lands to which said group was entitled under said article and could not comply therewith. That Section 3 of said Act provided, in part, as follows:

> Sec. 3 * * *. "But if the United States shall have disposed of any tract of land to which any Indian was entitled, under the provisions of said fourteenth article of said treaty, so that it is now impossible to

give said Indian the quantity to which he was entitled, including his improvements, as aforesaid, or any part of it, or to his children, on the adjoining lands, the said commissioners shall thereupon estimate the quantity to which each Indian is entitled, and allow him, or her, for the same, a quantity of land equal to that allowed, to be taken out of any of the public lands in the States of Mississippi, Louisiana, Alabama, and Arkansas, subject to entry at private sale; and certificates to that effect shall be delivered, under the direction of the Secretary of War, through such agent as he may select, not more than one-half of which shall be delivered to said Indian until after his removal to the Choctaw territory west of the Mississippi River."

That very few, if any, of said Indians received certificates of scrip thereunder, and if so received, payment therefor has not been made to them by defendant; nor did said Indians receive lands in lieu thereof, as promised in the above-quoted Sec. 3 of the Act.

7. That by the terms of the Act of March 3, 1845, (5 Stat. 777), it was provided that of the scrip which has been awarded, or which shall be awarded, to Choctaw Indians under the provisions of said Act of 1842, "that portion thereof not deliverable East, by the third section of said law, shall not be issued or delivered in the West, but the amounts awarded for land on which they resided but which it is impossible for the United States now to give them, shall carry an interest of five per cent, which the United States will pay annually to the reservees under the treaty of one thousand eight hundred and thirty, respectively, or to their heirs and legal representatives, forever, estimating the land to which they may be entitled, at one dollar and twenty-five cents per acre."

8. That by the Act of July 21, 1852, (10 Stat. 15, 19), Congress appropriated money for payment of interest on the amounts awarded Choctaw claimants under said Ar-

ticle 14 of the 1830 treaty for lands on which they resided for the half year ending thirtieth of June, 1852, $21,800.00, and provided that after said date all payments of interest on said awards shall cease, and that the Secretary of the Interior was by said Act directed to pay said claimants the amount of principal awarded in each case, and the said Act appropriated $872,000.00. That your petitioners, and those on whose behalf this action is brought, never received said interest, nor the said sum of $872,000.00.

9. That under date of June 22, 1855, the defendant entered into a treaty with the Choctaw and Chickasaw tribes of Indians, (11 Stat. 611—2 Kapp. 706), to which your petitioners and the group represented herein, were not parties, and the said Choctaw and Chickasaw tribes had no authority, nor interest, to represent them, having been completely divorced from said group since 1830 or 1831. That in said treaty said parties agreed that their right to the net proceeds of the lands cede by them to the United States under the Treaty of 1830, supra, together with the whole subject-matter of their unsettled claims, whether national or individual, against the United States, arising under the various provisions of said treaty, should be referred to the Senate of the United States for final adjudication and adjustment. That neither the said net proceeds of the lands, nor said unsettled claims, included the claims, rights, or subject matter of the claims alleged herein, nor has there ever been an adjudication or payment thereof, in favor of the group in whose behalf this amended petition is filed.

10. That in said treaty of 1855, the defendant assumed the responsibility of making payment thereof to individual claimants thereunder, it being specifically stated in Article XII thereof that settlement and payment was to be made with the advice and under the direction of the United States agent for the tribe, which obligation the defendant failed to fulfill. That the defendant never made

payment or settlement in favor of the ancestors of your petitioners, who were entitled thereto.

11. That on March 29, 1859, the Senate of the United States came to a decision thereon and passed a resolution that the claimants be allowed the proceeds of the sale of such lands as have been sold by the United States on the 1st day of January last, deducting therefrom the costs of their survey and sale, and all proper expenditures and payments under said treaty, excluding the reservations allowed and secured, and estimating the scrip issued in lieu of reservations at the rate of $1 25 per acre; and that the Secretary of the Interior cause an account to be stated with the Choctaw showing what amount is due them. That in an account, dated March 22, 1860, the Secretary of the Interior certified that the United States owed under said resolution of the Senate for and on account of the "net proceeds" of the lands *ceded* by the said treaty of September 27, 1830, the sum of $2,981,247.30. That before arriving at said figure in said account, the defendant charged as a credit in its favor the following item: "Scrip allowed in lieu of reservations, viz, 1,399,920 acres, at 1.25 per acre, $1,749,900.00", no part of which, however, the defendant ever paid to your petitioners.

12. That on March 3, 1881, Congress passed a statute (21 Stat. 504), conferring jurisdiction upon the Court of Claims "to try all questions of difference between the United States and the *Choctaws of the Indian Territory*. That suit was instituted thereon by the Choctaw Nation against the defendant, to which your petitioners were not parties, nor was the suit filed in their behalf, same being reported in 21 Ct. Cls. 59, and that court refused to confirm the award of the Senate; that upon appeal, the Supreme Court of the United States reversed the judgment of the Court of Claims and confirmed the award of the Senate. That the Senate award did not adjudicate or adjust the claims of your petitioners herein.

WHEREFORE, petitioners pray for judgment against the defendant for the value of, to wit, 1,404,640 acres of land, allotted as reservations under said article 14 of the treaty, at such sum per acre as will be shown by evidence as constituting fair and just compensation to petitioners, with interest at 5% per annum, and costs. That in the alternative, judgment be rendered against the defendant in payment to petitioners of scrip certificates issued in lieu of said lands, in such amount as to the Commission may deem fair and just compensation, with interest at 5% per annum, and costs; and /or, that judgment be rendered against the defendant in payment of the individual claims arising under said Article 14, in accordance with the obligations of the defendant in the treaty of 1855, with interest at 5% per annum, and costs.

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Acknowledgement of Service

Receipt of copy of aforementioned second amended petition is hereby acknowledged, this 30th Day of December, 1952.

CURTIS SHEARS,
Special Attorney
for Defendant.

Exhibit C

TREATY WITH THE CHOCTAW NATION,

September 27, 1830
(7 Stat. 333)

Article XIV. Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the Agent within six months from the ratification of this Treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one half that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under 10 years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years after the ratification of this Treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity.

Exhibit D

ACT OF CONGRESS, AUGUST 13, 1946, (60 STAT. 1049)

JURISDICTION

SEC. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U.S.C. sec. 250), as amended: the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

Service of copy of the foregoing Petition for Writ of Certiorari and Appendix thereto admitted this ..... day of July, 1956.

.....
Solicitor General of the
United States

Service of copy of the foregoing Petition for Writ of Certiorari and Appendix thereto admitted this 18 day of July, 1956.

/s/ W. F. Semple

W. F. Semple
412 Atlas Life Building
Tulsa, Oklahoma,
Attorney for Choctaw Nation

I, HORACE S. WHITMAN, Attorney for Joseph Chitto, et al., hereby certify that a copy of the foregoing Petition for Writ of Certiorari and Appendix thereto was mailed to each of the following:

The Solicitor General of the
United States, Department of Justice,
Curtis C. Shears and Perry W. Morton,
Assistant Attorney General,
Attorneys below for the United States
Department of Justice,
and W. F. Semple, Attorney for
Choctaw Nation.

Horace S. Whitman
Horace S. Whitman,
Attorney for Petitioners.